86-934

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT T. PUSKARIC
TECHNICAL SERGEANT, UNITED STATES AIR FORCE

AND

CHESTER JENKINS
AIRMAN FIRST CLASS, UNITED STATES AIR FORCE
PETITIONERS,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

LEO L. SERGI
Colonel,
Office of the Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

and

HARRY L. HEINTZELMAN, IV
Major,
Office of The Judge Advocate General
United States Air Force

DEBORAH J. HUDSPETH
Captain,
Office of The Judge Advocate General
United States Air Force

43 pp

QUESTIONS PRESENTED

I. Whether the military judges' findings of "service connection" over the challenged off-base offenses exceeded the boundaries for the exercise of court-martial jurisdiction established by this Court.

II. Whether it is constitutionally permissible for the military to exercise court-martial jurisdiction over offenses which, upon application of the detailed analysis mandated by this Court, are not "service connected."

III. Whether a servicemember's rights under the Constitution to indictment by a grand jury and trial by petit jury for offenses which are not "service connected" may be abrogated by the Court of Military Appeals and lower military courts through their overly expansive interpretations of "service connection," or by Congress' authority to "make Rules for the Government and Regulation of the land and naval forces."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

ROBERT T. PUSKARIC
TECHNICAL SERGEANT, UNITED STATES AIR FORCE

AND

CHESTER JENKINS
AIRMAN FIRST CLASS, UNITED STATES AIR FORCE
PETITIONERS,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioners, Robert T. Puskaric and Chester Jenkins respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Military Appeals entered in these proceedings on October 9, 1986.

OPINIONS BELOW

The summary disposition by the Court of Military Appeals (COMA) in the case of Technical Sergeant Puskaric is reported at 23 M.J. ____ (C.M.A. 1986) (Appendix A). The summary disposition by COMA rendered in the case of Airman First Class Jenkins appears at 23 M.J. ____ (C.M.A. 1986) (Appendix B). The summary opinions of the Air Force Court of Military Review were issued on October 11, 1985, in TSgt Puskaric's case, *United States v. Puskaric*, ACM 24826 (A.F.C.M.R. October 11, 1985) (Appendix C), and on June 21, 1985, in A1C Jenkins' case, *United States v. Jenkins*, ACM 24671 (A.F.C.M.R. June 21, 1985) (Appendix D)

JURISDICTION

The Court of Military Appeals granted petitions for review in both cases under Article 67(b)(3), Uniform Code of Military Justice (10 U.S.C. § 867) on the issue of "service connection" over off-base offenses. On October 9, 1986, the Court of Military Appeals summarily affirmed both cases in light of *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986) and *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983). The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) and 28 U.S.C. § 1259.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Article I, § 8, Cl. 14: "[Congress shall have power] to make Rules for the Government and Regulation of the land and naval Forces. . . ."
>
> Article III, § 2, Cl. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."
>
> Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be . . . deprived of life, liberty, or property, without due process of law. . . ."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

MANUAL FOR COURTS-MARTIAL PROVISIONS INVOLVED

The Rules for Courts-Martial, Manual for Courts-Martial, United States, 1984, provides as follows:

> Rule 201(b): "Requisites of courts-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:
>
> * * *

(5) The offense must be subject to court-martial jurisdiction.

Discussion

See R.C.M. 203. The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect. . . ."

Rule 203: "Jurisdiction over the offense. To the extent permitted by the Constitution, courts-martial may try any offense under the code and, in the case of general courts-martial, the law of war."

The discussion and analysis of Rule 203, are contained in Appendix E.

STATEMENT OF THE CASE

I

TSgt Robert T. Puskaric

In September 1984, Sergeant Valerie J. Puskaric, petitioner's ex-wife, advised the Air Force Office of Special Investigation that she had received a letter from Noranne Versberg, the wife of a retired servicemember, alleging petitioner had molested Mrs. Versberg's pre-teenage daughter Melanie on two different occasions – one time, in April 1983, when Melanie spent the night in the on-base residence petitioner shared with his wife, and once later that summer after petitioner's divorce in petitioner's off-base apartment. During an Air Force investigation of these allegations, petitioner confessed to fondling Melanie's breasts on these two occasions.

As a result of these incidents, petitioner was tried by general court-martial at Loring Air Force Base, Maine. Prior to petitioner's arraignment, the defense moved to dismiss Specification 2, the specification alleging the commission of indecent acts with a child under sixteen years of age at petitioner's off-base apartment, for lack of subject matter jurisdiction.

On the occasion of the off-base incident, the victim was to baby-sit the weekend for petitioner's infant son at his residence in a civilian community located near Loring Air

Force Base. The victim's parents drove her to appellant's off-base home and dropped her off. (R. 21, 22). That day, petitioner was not on duty nor in uniform. (R. 21, 30). Although petitioner, his former wife, and the victim's father were assigned to the same squadron at Loring Air Force Base, petitioner did not work with either of the victim's parents prior to or during the time of the offenses and had no official relationship with them. (R. 14, 32, 34). Petitioner met the victim and her parents through his wife who employed the victim and her mother to care for the Puskaric's infant son. (R. 16, 21).

The jurisdictional statement attached to petitioner's charge sheet averred the following bases for exercising subject matter jurisdiction over the offenses:

> Jurisdictional Basis (sic): The offenses were committed by an active duty member of the United States Air Force. The victim of the offenses was then the dependent of an active duty member of the United States Air Force. These offenses involved a direct flouting of military authority, are a type which have been traditionally tried by courts-martial, and present an affront to the interests of the Commander and the United States Air Force in maintaining a disciplined and effective fighting force which can only be adequately vindicated in a trial by courts-martial. In addition, the offense alleged in Specification 1 occurred on Loring Air Force Base, a military installation under military control.
>
> Additional Jurisdictional Basis (sic) for Specification 2: The offense alleged in Specification 2 was committed at or near Caribou, Maine, a small community located near Loring Air Force Base, Maine. The victim of the offense alleged in Specification 2 resided on Loring Air Force Base at the time of the offense, and the accused had her travel from her Loring residence to his off-base apartment in Caribou under the pretense of babysitting for him. The offense involves the same victim as that alleged in Specification 1 and should be disposed of in the same forum in the interest of judicial economy.

Attached to the record was a letter from the local county prosecutor in which he declines "civil prosecution of the offense and defers the entire matter to your [the Air Force's] authority." (App. Ex. VI).

In determining whether the off-base offense was "service connected," the trial judge found:

> With respect to the defense Motion to Dismiss Specification 2 of the Charge for lack of subject matter jurisdiction, the court makes the following essential findings of fact:
>
> 1. At the time of the alleged offenses, the accused was properly absent from his duty station in a non-duty status.
>
> 2. The alleged offense occurred outside the limits of the military installation of Loring Air Force Base in the civilian community of Caribou, Maine.
>
> 3. The accused was not performing military duties at the time of the alleged offense.
>
> 4. The alleged offense occurred at a place not under military control.
>
> 5. The alleged offense was committed within the territorial limits of the United States.
>
> 6. The alleged offense was unrelated to authority stemming from the war power.
>
> 7. There was no connection between the accused's military duties and the alleged offenses.
>
> 8. The alleged victim was not a member of the United States Air Force but was a dependent of an active duty member of the United States Air Force who was at the time a member of the accused's squadron.
>
> 9. There is present and available a duly constituted civilian court in which this offense could be prosecuted in Aroostook County, Maine.
>
> 10. The District Attorney for Aroostook County has declined prosecution of the offense alleged in Specification 2 of the Charge and has deferred that matter to military authority, upon his understanding that the more

serious misconduct with the alleged victim has occurred on Loring Air Force Base, apparently the matter alleged in Specification 1 of the Charge; in effect, deferring to military disposition the entire course of alleged misconduct with the same alleged victim.

11. The alleged offense does not constitute a flouting of military authority.

12. The alleged offense does constitute a threat to Loring Air Force Base, Maine, and its personnel in that indecent acts by one military member against a dependent of another military member of the same squadron tend to have a particularly deleterious effect upon not only the morale of the military sponsor of the dependent victim, but also upon squadron morale as well as base morale generally.

13. There was no violation of military property involved in the alleged offense.

14. There is no evidence that the accused formulated the criminal intent necessary to this alleged offense while on Loring Air Force Base.

15. There is no evidence that the accused made necessary and integral preparations for the commission of the alleged offense while on Loring Air Force Base. However, without the professional and social relationship between the accused's military wife and the alleged victim and her military family and the resulting on-base social relationship between the accused and the alleged victim and her military family, the arrangements which facilitated the commission of the alleged offense could not have been made.

16. The alleged offense is one which is traditionally tried in both civilian courts and courts-martial.

17. Economy of judicial effort would be achieved through trial of all offenses alleged against the accused in this court-martial.

Therefore, balancing all the facts enumerated in *Relford v. Commandant*, I conclude that the factors I have just listed weigh in favor of the exercise of military jurisdic-

> tion, that the military interest in deterring this alleged offense is distinct from, and greater than, that of civilian society, and that that distinct and greater interest can be vindicted adequately only in a trial by courts-maritial; and that this court has jurisdiction over the offense alleged in Specification 2 of the Charge. The defense motion to dismiss Specification 2 of the Charge for lack of subject matter jurisdiction is denied.

(R. 41, 42).

As a consequence of the judge's ruling, petitioner pleaded guilty to fondling the victim's breasts on one occasion at his on-base residence and not guilty to the off-base incident. After the presentation of evidence, the military judge, sitting alone, convicted petitioner, by exceptions and substitutions,[1] of both the on-base and off-base offenses and sentenced him to a bad conduct discharge, confinement for 24 months, forfeiture of $100.00 per month for 24 months and reduction to the lowest enlisted grade, airman basic.

After considering the matters required under Article 60, Uniform Code of Military Justice,[2] the court-martial convening authority approved the findings and sentence adjudged by the court on March 8, 1985.

---

[1] In military practice, the fact-finder may modify the specification to except a matter on which they have doubt and still reach a finding of guilty so long as (1) all the elements of the offense are proved beyond a reasonable doubt and (2) the fact-finder modifies the criminal specification to correctly reflect their findings. Rule for Court-Martial 918(a), Manual for Courts-Martial, 1984; Department of the Army Pamphlet 27-9, paragraph 7-15. In this case, petitioner was originally charged with "putting his hand under [the victim's] nightgown and fondling her breasts, and by inserting his hands inside her panties and touching her private parts." In making his guilty plea to the on-base incident, petitioner excepted the words, "and by inserting his hand inside her panties and touching her private parts," from the specification. The judge, acting as fact-finder, excepted the words "private parts" from the specification, and substituted therefore the words "lower abdomen," in finding petitioner guilty of committing indecent acts.

[2] 10 U.S.C. § 860. In contrast to civilian practice, an adjudged court-martial sentence must be approved by the convening authority. Article 60 of the Uniform Code of Military Justice requires the convening authority

At both the Air Force Court of Military Review and the Court of Military Appeals, appellate defense counsel raised the issue of subject matter jurisdiction over the off-base offense. On October 11, 1985, the Air Force Court of Military Review affirmed petitioner's conviction. On March 3, 1986, the Court of Military Appeals granted review in petitioner's case as to "whether the military judge erred by denying the defense motion to dismiss specification 2 for lack of jurisdiction." *United States v. Puskaric*, 21 M.J. 96 (C.M.A. 1986) (order granting petition for review). On further consideration of the granted issue, the Court of Military Appeals affirmed petitioner's conviction of the off-base offense in light of its decisions in *United States v. Solario, supra* and *United States v. Lockwood, supra.*

II

A1C Chester Jenkins

On July 25, 1983, Lisa Acosta, a 14-year-old military dependent obtained her mother's permission to stay out late so Lisa could ostensibly baby-sit for another family. In reality, Lisa wanted to go out with petitioner, a 25-year-old black airman, whom Lisa had met on Edwards Air Force Base, California, and started seeing earlier that month. As part of her ruse, Lisa gave her mother a false address of the place where she would supposedly be babysitting.

After Lisa left with petitioner at 7:00 p.m., some children came to the Acosta on-base residence and told Mrs. Acosta, "Your daughter is seeing a 21-year-old black guy." After further questioning Mrs. Acosta discovered her daughter was not babysitting, but on a date with the petitioner. After fail-

---

to consider the result of trial, the recommendation of his or her staff judge advocate and any clemency matters submitted by the accused or his attorney before taking action on the case. The convening authority may not increase any sentence adjudged or change a finding of not guilty. The convening authority may, based on matters submitted by the accused or other matters, reduce the sentence adjudged, disapprove the entire sentence or disapprove any or all of the findings of guilty.

ing to find the address on a map of Edwards Air Force Base, Mrs. Acosta confirmed with the local civilian police that the name and address her daughter had given her was a false one.

Worried, Mrs. Acosta looked through her daughter's papers and discovered an unfinished letter in which Lisa Acosta wrote about dating someone named Chester Jenkins, who was a 21-year-old and an airman in the Air Force. Armed with the suspected identity of her daughter's date, Mrs. Acosta spoke with her husband who was working that evening. Using the locator, her husband confirmed a Chester Jenkins was assigned to Edwards Air Force Base and gave her petitioner's dormitory and room number.

Mrs. Acosta then called the Security Police and explained the situation to them. The Security Police went to petitioner's dormitory room to check if he and Lisa Acosta were there. The Security Police inquiry revealed petitioner and Lisa had been there and were seen heading back towards the housing area. The Security Police informed Lisa's parents what they had found and staked out the Acosta residence. At about 11:00 p.m., the petitioner dropped Lisa Acosta off in front of her residence. As soon as Lisa entered the house, her mother confronted her and pointedly asked Lisa if she had had sexual relations with petitioner. After initially denying any sexual involvement, Lisa told her mother what allegedly had transpired. Simultaneously, petitioner was stopped near the Acosta home by the Security Police. The following day, Lisa provided a detailed statement about her relationship with petitioner. Before and at trial, petitioner denied engaging in any sexual acts with Lisa.

Based in large part on statement solicited from Miss Acosta, petitioner was tried at a general court-martial, sitting with officer members, and convicted of carnal knowledge and oral sodomy for incidents occurring on-base on July 25, 1983; contributing to the delinquency of a minor "by encouraging her [Lisa Acosta] to engage in sexual acts and performing actions which tended to prevent the discovery of those sexual acts by Lisa M. Acosta's parents or competent authority;" and "wrongfully solicit[ing] Lisa M.

Acosta [on an earlier occasion] to assist the said A1C Chester Jenkins in the commission of the [off-base] offense of sodomy . . . by requesting her 'to give him head' or words to that effect."

The relevant testimony concerning this off-base solicitation offense reveals that in late June or early July 1983, Miss Acosta first saw A1C Jenkins in the commissary while shopping with her parents. (R. 56). On 15 July 1983, on the way home from the Youth Center, A1C Jenkins stopped his car and started talking to her. (R. 57). She said that he asked her how old she was. When she told him fourteen and a half, he initially said she was too young, but later changed his mind. (R. 57-58). He ended up taking her and her girl friend, Violet, for pizza. (R. 58). Before he dropped her off a couple of blocks from her home, he gave her his telephone number. (R. 58-59). She called him the next day, and he drove by her house, although he did not stop. (R. 59).

On 17 July 1983, she and Violet needed a ride so she called A1C Jenkins. He came, picked them up, and drove then to an on-base swimming pool. When they were done there, he drove them to Violet's house. (R. 59).

A1C Jenkins, Lisa, and Violet had made arrangements to go bowling on 18 July. A1C Jenkins and Lisa met at the bowling alley. They were later met by Violet. (R. 59-60). Eventually, they all went to the home of a friend of Violet's (located on base), where they talked for quite some time. (R. 60).

A1C Jenkins then drove Violet and Lisa to about one block from Lisa's house. The two girls went to see Lisa's parents to ask if she could spend the night at Violet's. After receiving her parents' permission, they went back to A1C Jenkins' car. The three went to the barracks and picked up a friend of A1C Jenkins. Then they all went to Lancaster, a neighboring community, where they had dinner at a McDonald's. (R. 60-62). After that, they went to Apollo County Park where the solicitation to commit sodomy was alleged to have occured.

The jurisdictional bases alleged on the charge sheet were:

1. The accused in an active duty member of the United States Air Force.

2. The offenses occurred at on near Edwards Air Force Base, California, an active military installation of the United States Armed Forces.

3. The offenses constituted a threat to the military installation and its mission.

4. The offenses constituted a flouting of military authority.

At the trial, petitioner's defense counsel challenged the exercise of subject matter jurisdiction over the solicitation offense. The defense argued that since this offense occurred in Apollo County Park, California, approximately 20 miles away from Edwards Air Force Base, there was no service connection pursuant to Rule for Court-Martial 203, M.C.M., 1984. (R. 144). The government argued that the following factors gave the military jurisdiction to try this offense: Miss Acosta was a 14-year-old military dependent whose father was stationed at Edwards Air Force Base; the entire relationship between petitioner and Miss Acosta occurred on the installation, except for two off-base trips known to the Government; the solicitation offense was part of a continuing course of conduct culminating in the on-base sodomy and carnal knowledge offenses; and the local prosecutor had declined to prosecute petitioner for the Apollo Park solicitation offense. (R. 144, 145, App. Ex. I).

The military judge denied the defense's jurisdictional challenge saying that:

> Apollo County Park, California, is not a military installation, that it is off Edwards Air Force Base, and not on any other installation. Taking into consideration the matters set forth in all the specifications on page 2 and the jurisdictional basis on page 2, I find that the military has jurisdiction over all of the offenses.
>
> With respect to Specification 1, even though it was alleged to have occurred off base, I find that exercise of jurisdiction by the military is more appropriate than exercise of jurisdiction by any civilian tribunal. The relationship between Lisa Acosta and the accused was the direct result of their both residing on Edwards Air Force Base, the accused being assigned here and Lisa Acosta

> being a dependent residing on Edwards Air Force Base. A majority of the alleged offenses are alleged to have occurred on Edwards and the principle of judicial economy certainly comes into play; and I find that handling of all offenses in the same tribunal or the same judicial system is the appropriate way to go about it. So the motion is denied.

(R. 145).

As a result of his conviction for these various sex offenses, the court members sentenced petitioner to a dishonorable discharge, confinement for nine years, forfeiture of all pay and allowances and reduction to the lowest enlisted grade, airman basic. In approving petitioner's sentence under Article 60, U.C.M.J.,[3] the court-martial convening authority reduced petitioner's term of confinement to five years.

The issue of subject matter jurisdiction over the alleged off-base offense, among other issues, was raised at both the Air Force Court of Military Review and the Court of Military Appeals. In a *per curiam* decision, the Air Force Court of Military Review found an error not prejudicial to the petitioner on an unrelated issue and affirmed. (*See* Appendix D.)

The Court of Military Appeals granted review on the issue of whether the military judge erred in not dismissing the solicitation specification for lack of subject matter jurisdiction, *United States v. Jenkins*, 21 M.J. 154 (C.M.A. October 11, 1985) (order granting petition for review). On further consideration of the granted issue, the Court of Military Appeals summarily affirmed petitioner's conviction of the off-base solicitation offense on the same grounds as in TSgt Puskaric's case.

---

[3] 10 U.S.C. 860. *See* footnote 2, page 8.

REASONS FOR GRANTING THE WRIT

I

THE PETITIONERS' OFFENSES ARE NOT SERVICE CONNECTED WITHIN THE MEANING OF *O'CALLAHAN V. PARKER.*

The question *sub judice* is whether the off-base incidents of which petitioners were convicted were sufficiently service connected for the Air Force to exercise jurisdiction over the offenses. *In personam* jurisdiction over petitioners was neither disputed at trial nor in issue. In these cases, any service connection was too attenuated to support jurisdiction under the criteria established by this Court's precedents, and the exercise of military jurisdiction is incompatible with the broader purposes and needs of justice.

As more thoroughly discussed in the Petition for Writ of Certiorari in *Solorio v. United States*, 21 M.J. 251 (C.M.A. 1986), *cert. granted* 54 U.S.L.W. 3823 (U.S. June 16, 1986) (No. 85-1581), and the *Amicus Curiae* briefs in support of that Petition, this Court restricted the exercise of court-martial jurisdiction to only "service connected" offenses in *O'Callahan v. Parker*, 395 U.S. 258 (1969). In that case, this Court rejected the proposition that a service member's status, in and of itself, conferred jurisdiction over all offenses no matter when and where committed. Later in *Relford v. Commandant*, 401 U.S. 355 (1971), this Court established a number of benchmarks by which the "outward boundaries" of court-martial jurisdiction could be established.[4] These benchmarks provide the logical starting point for considering the question of jurisdiction in these cases.

[4] The *Relford* Court identified twelve factors to be used in determining service connection:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendent's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.

Applying the *Relford* factors in TSgt Puskaric's case, it is apparent that the off-base offense alleged is not service connected. TSgt Puskaric was properly absent from the base at

8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offense's being among those traditionally prosecuted in civilian courts.

Relford v. Commandant, supra, at 365 (1971). In addition, the Court stressed nine other considerations:

(a) The essential and obvious interest of the military in the security of persons and property in the military enclave.

(b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order.

(c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.

(d) The conviction that Art. I, § 8, cl. 14, vesting in the Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term "Regulation" itself implies, for those appropriate cases, the power to try and to punish.

(e) The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern and capacity for all the cases that vindicate the military's disciplinary authority within its own community. . . .

(f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance.

(g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. . . .

(h) The misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary law.

(i) The inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post.

Id. at 367-369.

the time of the offense; the offense was committed off-base within the United States during peacetime, at a place not under military control. This offense was not in any way related to petitioner's military duties; the victim is not a member of the military; a civilian court was available to prosecute the case; the offense did not constitute a flouting of military authority; there was no threat to the military post or property; and the offense is one traditionally tried by civilian courts.

There is no service connection over TSgt Puskaric's off-base offense even when applying other factors this Court has articulated in determining the existence of service connection.

> [The issue of service connection] turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society and on whether the distinct military interest can be vindicated adequately in civilian courts.

Schlesinger v. Councilman, 420 U.S. 738, 760 (1975).

This off-base incident had little impact on the military. At the time the offense was reported, the victim and her parents lived in Michigan and had resided there for over a year. Unlike the situation in *United States v. Solorio, supra*, concerns about passionate anger and desire for personal retribution by the victim's parents are not pertinent in this case because of the victim's father's retirement from active duty and the family's attenuated connection with the military community. There is no evidence that this isolated off-base incident was the subject of wide-spread or adverse publicity on Loring Air Force Base or in the civilian community where the incident took place. Quite simply the military interest in deterring this type of conduct is neither distinct from nor greater than that of the civilian community. Maine state courts are well-established, entirely able to prosecute, and child abuse is certainly an offense traditionally and aggressively prosecuted in Maine courts.

Although the military judge agreed with the defense that most of the *Relford* criteria did not support the exercise of jurisdiction, the military judge erroneously found two *Relford*

factors and one "Relford-like" consideration present. As the judge stated in his findings of fact:

* * *

> 12. The alleged offense does constitute a threat to Loring Air Force Base, Maine, and its personnel in that indecent acts by one military member against a dependent of another military member of the same squadron tend to have a particularly deleterious effect upon not only the morale of the military sponsor of the dependent victim, but also upon squadron morale as well as base morale generally.
>
> * * *
>
> 15. There is no evidence that the accused made necessary and integral preparations for the commission of the alleged offense while on Loring Air Force Base. However, without the professional and social relationship between the accused's military wife and the alleged victim and her military family and the resulting on-base social relationship between the accused and the alleged victim and her military family, the arrangements which facilitated the commission of the alleged offense could not have been made.
>
> * * *
>
> 17. Economy of judicial effort would be achieved through trial of all offenses alleged against the accused in this court-martial.

(R. 41, 42).

Simply because the petitioner and the victim's father worked in the same squadron does not make the alleged off-base offense a threat to the military installation. This is particularly true in this case because the victim's father was not on the base and not in the Air Force at the time the victim reported the alleged offense. The military judge's finding that the alleged offense "... tend[s] to have a particularly deleterious effect upon . . . the morale of the military sponsor of the dependent victim, . . . [and] upon the squadron morale as well as the base morale . . ." (R. 42). is not supported by the evidence. Unlike *Solorio*, the government did not, and could

not, point to the deterioration of the victim's father's military duty performance. *See* Brief for the United States at 13, 14, *Solorio v. United States, supra.*

Significantly, the trial judge found that the appellant made no necessary and integral preparations for the commission of the alleged offense while on Loring Air Force Base. Instead of stopping here, the judge then gets involved in wild speculation. He purports to "conclude" that "but for" the professional and social relationship between the appellant's wife and the victim's family, arrangements leading to the commission of the alleged offense could not have been made. Hindsight is wonderful, but surely we cannot wildly speculate that had the victim's family been civilian the petitioner and his wife would not have otherwise met them.

The judge also felt that judicial economy was a key element in determining that jurisdiction existed over the offense in specification 2. Judicial economy alone cannot confer subject matter jurisdiction upon a military court. Not even pendent jurisdiction (as the term was used in *United States v. Lockwood, supra,*) would give the Air Force jurisdiction over this off-base offense. As the Court of Military Appeals points out in *United States v. Lockwood, supra,* at 7,:

> [W]e are reluctant to rely heavily on a theory which is predicated chiefly on considerations of judicial economy and which had been developed for civil, rather than criminal, trials. "Pendent jurisdiction" does not in itself provide an adequate basis for depriving an accused servicemember of constitutional protections to which he would otherwise be entitled to in a criminal trial. See *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966).

The fact that the offense was committed in a civilian community near the base does not yield court-martial jurisdiction either. The "commuter distance" theory of jurisdiction has been rejected by the United States Court of Military Appeals. *United States v. Alef.* 3 M.J. 414, 418 n.12 (C.M.A. 1977).

The Air Force Court of Military Review affirmed the findings of guilty and sentence without opinion. However, the

court cited several cases as authority for its decision.[5] In two of the cited cases, jurisdiction was based on the "impact of the offense upon the reputation and integrity of the Armed Services." *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985); *United States v. Griffin*, 21 M.J. 501 (A.F.C.M.R. 1985). The rationale used by the Air Force court below in *Benedict* and *Griffin* extends "service connection" to any offenses committed by a military member off-base, in doing so the Air Force Court of Review relied on speculated impact on the reputation and integrity of the Armed Forces. Their interpretation significantly extends the Court of Military Appeal's rationale in *United States v. Lockwood*,[6] *supra*, wherein that Court gave renewed emphasis to such factors as "reputation," "morale," and "integrity of the base itself" in determining "service-connection" of off-base offenses. *Id.* at 10. More importantly, such an interpretation of the *Lockwood* decision[7] effectively decouples the finding of service connection from the *Relford* criteria and permits the exercise of jurisdiction when an off-base offense has any articulable or perceptible negative impact "on the military operation and the military mission." *United States v. Lockwood*, *supra*, at 10, citing *United States v. O'Callahan*, *supra*, at 367.

---

[5] *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985); *United States v. Griffin*, 21 M.J. 501 (A.F.C.M.R. 1985); *United States v. Shorte*, 18 M.J. 518 (A.F.C.M.R. 1983), *aff'd* 20 M.J. 414 (C.M.A. 1985); *United States v. Herring*, 20 M.J. 1002 (A.F.C.M.R. 1985).

[6] Airman Lockwood pleaded guilty to stealing his roommate's wallet, containing a military identification card and other forms of identification and later pretending to be the owner of the stolen documents in order to obtain an off-base loan. In obtaining the loan, Airman Lockwood executed a promissary note on which he forged his roommate's signature. These off-base acts gave rise to a forgery and a second larceny charge.

[7] The Court of Military Appeals discussed the following issues in finding jurisdiction in *Lockwood*:

> (i) Although "*pendent jurisdiction*" does not in itself provide an adequate basis for depriving an accused servicemember of the constitutional protection to which he would otherwise be entitled in a criminal trial," the same concerns which support "pendent jurisdiction" are relevant in determining whether service connection exists. Consequently,

In *Lockwood* and in *United States v. Shorte*,[8] 18 M.J. 518 (A.F.C.M.R. 1984), *aff'd* 20 M.J. 414 (C.M.A. 1985), cited by the Court of Military Review in affirming jurisdiction, there was a legitimate, significant impact on the installation, whereas in this case there is no impact. When the offense was discovered, the victim and her parents had no *nexus* with Loring Air Force Base, and the victim's father had retired from the Air Force.

Without the presence of a legitimate *Relford* factor, the decision of the local prosecutor not to exercise jurisdiction should not operate as the linchpin justifying the exercise of court-martial jurisdiction. A servicemember should not suffer a criminal trial and face conviction of a non-service connected off-base offense merely because civilian prosecutors elect not to prosecute. A civilian community cannot pass its jurisdiction over a non-service connected offense to the military.

Turning to A1C Jenkins' case, similar shortcomings in the judge's finding of jurisdiction over the off-base solicitation offense are to be found. The judge appeared to rest the court's

---

disposition of an entire course of criminal conduct at one trial (judicial economy) may provide adequate basis for exercising court-martial jurisdiction. *Id.* at 7, 8.

(ii) *Reputation of the Military.* Adverse impact of off-base offenses on the general reputation of the installation supports service connection. *Id.* at 9, 10.

(iii) *Use of military status or property in furtherance of the crime.* (Court of Military Appeals considered Lockwood's use of victim's ID card to commit offense as a "flouting of military authority") *Id.* at 8, 9.

(iv) *Initiation of crime on instalation.* Military has interest in punishing crimes initiated on-base, even if consummated off-base (building on the reasoning first seen in *United States v. Moore*, 2 M.J. 749 (A.F.C.M.R. 1977) and *United States v. Hedlund*, 7 M.J. 271 (C.M.A. 1979)). *Id.* at 8, 9.

(v) *Failure to contest jurisdiction.* Defendant's failure to contest jurisdiction justified "drawing any reasonable inferences against him with respect to factual matters not fully developed in record of trial." *Id.* at 6, 7.

[8] In finding jurisdiction in *United States v. Shorte*, the Court determined an on-base altercation was the catalyst that began the chain of events that, shortly thereafter, resulted in Airman Shorte's stabbing of another military member. Moreover, the injuries the victim received were serious enough to require his hospitalization for twelve days, thereby making the victim unavailable to perform his military duties.

exercise of jurisdiction over the solicitation offense on two theories. First, since the military had jurisdiction over the other offenses, "the principle of judicial economy comes into play; and I find that handling of all offenses in the same tribunal or the same judicial system is the appropriate way to go about it." (R. 145). The second theory was that of a continuing course of conduct which rested on the fact that the relationship between the petitioner and Miss Acosta was the direct result of their living on the military installation. (R. 145).

The first theory can be traced to the discussion of "pendent jurisdiction" in *United States v. Lockwood, supra,* at 7. As previously discussed, the concerns supporting "pendent jurisdiction" are only relevant to a service-connection analysis if there is some palpable impact on the military. The alleged off-base solicitation did not have such an impact. The incident occurred at night in a remote area of the California desert in a private automobile with no one present except Miss Acosta and the petitioner. The evidence was such that the local prosecutor declined to prosecute.

When compared with the circumstances in *United States v. Shorte, supra,* quite clearly the off-base solicitation offense which occurred over a week before the on-base sex offenses did not constitute a continuing offense.

In conclusion, petitioners' off-base offenses are not service connected based on this Court's precedents and the Air Force could not constitutionally exercise jurisdiction over them.

II

THIS COURT'S PRECEDENTS STRIKE THE CORRECT BALANCE BETWEEN THE UNIQUE INTERESTS OF THE MILITARY AND THOSE OF ITS CITIZEN SOLDIERS.

The maintenance of military discipline, morale, and efficiency are undeniably important, but these factors are not always, and in every situation, to be regarded as the United States would suggest in *Solorio,* to be paramount to a servicemember's exercise of essential liberties under the Constitution. Never has this Court held that all rights covered by

the Fifth and Sixth Amendments were abrogated by Article 1, § 8, cl. 14 of the Constitution empowering Congress to make rules for the armed forces. This Court in *O'Callahan* and *Relford* crafted the proper balancing test – service connection – which ensures the servicemember's right to civilian trial is protected while limiting it so it does not interfere with the legitimate need for discipline in the military.

As Justice Douglas aptly noted in *Lee v. Madigan*, 358 U.S. 228, 232 (1958), the Court does not write on a clean slate when weighing the propriety of the military exercising jurisdiction over non-military offenses. As counsel for *Solorio* pointed out, service connection has evolved into a well-defined principle of law. Brief for Petitioner at 36-39, *Solorio v. United States*, No. 85-1581.

The United States has suggested that the service connection test conceived in *O'Callahan* was a radical departure from this Court's prior decisions where "status" was the test for the exercise of court-martial jurisdiction. The ultimate recognition of servicemember's essential Constitutional rights in *O'Callahan* is no different from other "departures" of this Court in the field of civil rights. As Justice Stewart observed in *Carrington v. Rash*, 380 U.S. 89, at 97 (1965), "The uniform of our country must not be a badge of disfranchisement for the men or women who wear it."

In *Solorio*, the United States argues that the service connection test is burdensome.[9] The requirement for service connection is a no greater source of litigation than other subjects involving similar tensions between conflicting constitutional interests.

Until recently, service connection has been interpreted by the Court of Military Appeals and the military Courts of Review so as to limit its scope to the boundaries established by this Court in *O'Callahan* and *Relford* and at the same time

---

[9] Using a similar analysis, the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), should be overturned because it is a similarly radical departure from prior precedent and school desegregation "busing" cases unnecessarily burden the courts.

supplying considerable specificity by the way of example of the types of offenses encompassed within that term. The Court of Military Appeals departed from this course in *Lockwood* when that Court did not limit itself to the facts supporting service connection and spoke in such sweeping terms about discipline, morale and efficiency that the *Relford* criteria were left in the dust. Since the *Lockwood* decision, the Courts of Review have come close to embracing the view that any negative impact on the military operation and military mission warrants the exercise of court-martial jurisdiction. Terms as amorphous as "discipline" and "morale" invite the latitudinous interpretations the Courts of Review have rendered in finding subject matter jurisdiction over off-base offenses. As one commentator has wryly noted, the only limitations to the finding of service connection over off-base offenses is currently the imagination of the prosecutor. Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years after O'Callihan v. Parker,* 25 AF L. Rev. 1 (1985).

A product of the prosecutor's imagination should not serve to abrogate a servicemenber's Constitutional rights as a citizen. Such encroachments on a servicemember's rights should be curtailed by a clear pronouncement that an off-base offense must be "service connected," as this Court has articulated that term, before the military exercises court-martial jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the United States Court of Military Appeals.

LEO L. SERGI
Colonel,
Office of the Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

and

HARRY L. HEINTZELMAN, IV
Major,
Office of The Judge Advocate General
United States Air Force

DEBORAH J. HUDSPETH
Captain,
Office of The Judge Advocate General
United States Air Force

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 53866/AF
CMR Dkt. No. 24826

UNITED STATES, APPELLEE

v.

ROBERT T. PUSKARIC (203-38-8707), APPELLANT

ORDER

On further consideration of the granted issue (22 M.J. 96) in light of *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986), and *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983), it is by the Court this 9th day of October, 1986.

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,*

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

---

*Judge SULLIVAN did not participate.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 52772/AF
CMR Dkt. No. 24671

UNITED STATES, APPELLEE

v.

CHESTER JENKINS (569-15-5951), APPELLANT

ORDER

On further consideration of the granted issue (21 M.J. 154) in light of *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986), and *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983), it is by the Court this 9th day of October, 1986.

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,*

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

*Judge SULLIVAN did not participate.

APPENDIX C

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24826

UNITED STATES

v.

TECHNICAL SERGEANT ROBERT T. PUSKARIC,
FR 203-38-8707
UNITED STATES AIR FORCE

---

11 OCT 1985

Sentence adjudged 8 March 1985 by GCM convened at Loring Air Force Base, Maine. Military Judge: George R. Stevens (sitting alone).

Approved sentence: Bad conduct discharge, confinement for twenty-four (24) months, forfeiture of one hundred dollars ($100.00) per month for twenty-four (24) months and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Lieutenant Colonel Michael D. Wims. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Captain Joseph S. Kistler and Captain Teresa J. Stremel, USAFR.

Before HODGSON, FORAY and MICHALSKI, Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors and the government's reply thereto and have concluded

that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the accused was committed. *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985); *accord United States v. Herring*, ___ M.J. ___ (A.F.C.M.R. 1985); *accord United States v. Griffin*, ___ M.J. ___ (A.F.C.M.R. 1985); *United States v. Shorte*, 18 M.J. 518 (A.F.C.M.R. 1984), *pet. den.* 20 M.J. 414 (C.M.A. 1985). Accordingly, the findings of guilty and sentence are AFFIRMED.

OFFICIAL

/s/ ELVA J. SMITH

Elva J. Smith
Documents Examiner
Court of Military Review

APPENDIX D

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24671

UNITED STATES

v.

AIRMAN FIRST CLASS CHESTER JENKINS, FR 569-15-5951
UNITED STATES AIR FORCE

---

21 JUN 1985

Sentence adjudged 21 September 1984 by GCM convened at Edwards Air Force Base, California. Military Judge: Allan C. Smith.

Approved sentence: Dishonorable discharge, confinement for five (5) years, forfeiture of all pay and allowances and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Major Kathleen G. O'Reilly. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Major Robert E. Ferencik, Jr.

Before RAICHLE, CANELLOS and CARPARELLI, Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors and the government's reply thereto. We find that it was error for military judge to admit the accused's Emergency

Data Card, as a matter of aggravation. R.C.M. 1001(b)(4). We further find that the error did not prejudice the accused. The approved findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are AFFIRMED.

OFFICIAL

/s/ ELVA J. SMITH

Elva J. Smith
Documents Examiner
Court of Military Review

APPENDIX E

EXTRACT FROM MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984, ADDRESSING RULE FOR COURTS-MARTIAL 203:

* * *

DISCUSSION

(a) *In general.* Courts-martial have power to try any offense under the code except when prohibited from doing so by the Constitution. (Jurisdiction over certain offenses and individuals may be affected by Article 3; *See* R.C.M. 202.) The major constitutional limitation on the subject-matter jurisdiction of court-martial was established by the Supreme Court of the United States in *O'Callahan v. Parker,* 395 U.S. 258 (1969), which held that an offense under the code may not be tried by court-martial unless it is "service-connected." Later decisions by the Supreme Court, the Court of Military Appeals, and other courts have established standards for applying the service-connection rule, as well as certain exceptions to it. Because each case depends on its own facts, and because these rules are subject to continuing interpretation, careful attention must be paid to service-connection in every case. The remainder of this discussion provides guidance concerning service-connection based on judicial decisions.

(b) *Pleading and proof.* The prosecution should plead the facts establishing jurisdiction (*see* R.C.M. 307(c)(3) Discussion (F)). If the issue is raised, the prosecution must prove the disputed facts necessary to establish jurisdiction over the offense. *See* R.C.M. 907(b)(1)(A). Jurisdiction must exist over each offense. The fact that some offenses with which the accused is charged are service-connected does not necessarily establish jurisdiction over others, even if they are of a similar or related nature. However, where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest helps provide a basis for finding service-connections for the off-base offenses.

(c) *Determining service-connection.*

(1) In *general.* In *Relford v. Commandant,* 401 U.S. 355 (1971), the Supreme Court identified 12 factors which may be considered in deciding service-connection. The factors are–

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offenses being among those traditionally prosecuted in civilian courts.

These factors are not exhaustive. The Supreme Court also described nine additional considerations in *Relford*:

> (1) the essential and obvious interest of the military in the security of persons and of property on the military enclave; (2) the responsibility of the military commander for maintenance of order in the command and the commander's authority to maintain that order; (3) the impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon the morale, discipline, reputation and integrity of the base itself, upon its personnel, and upon the military operation and the military mission; (4) Article I, section 8, clause 14 of the Constitution of the United States, vesting in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a servicemember-offender and turn that

person over to the civil authorities; (5) the distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community; (6) the presence of factors such as geographical and military relationships which have important significance in favor of service-connection; (7) historically, a crime against the person of one associated with the post was subject even to the General Article; (8) the misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law; (9) the inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a servicemember's duty and off-duty activities and hours on the post. In addition, the effect of the offense on the reputation and morale of the Armed Services is an appropriate consideration in determining service-connection.

The test is not simply a numerical tally of the presence or absence of these or other factors. Instead, the factors identify circumstances which may tend to weigh for or against service-connection, depending on the facts of each case. Thus, certain factors will tend to weigh more heavily than others in given situations. This balancing test been described by the Supreme Court:

> [The] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts.

Schlesinger v. Councilman, 420 U.S. 738, 760 (1975).

(2) *Military offenses.* Military offenses, such as unauthorized absence, disrespect offenses, and disobedience of superiors, are always service-connected.

(3) *Offenses on a military installation.* Virtually all offenses which occur on a military base, post, or other installation are service-connected. Similarly, offenses aboard a

military vessel or aircraft are service-connected. If an essential part of the offense occurs on a military installation, service-connection exists even though the remainder of the offense took place off base. However, on-base preparation to commit an offense or introduction onto a military installation of the fruits or instruments of a crime completed off base may not necessarily be sufficient to prove service-connection over an off-base offense. An offense which directly threatens the security of an installation may be service-connected even though it occurs off base. When an offense is committed near a military installation, the proximity may support a finding of service-connection, as when it injures relationships between the military and civilian communities and makes it more difficult for servicemembers to receive local support.

(4) *Drug offenses.* Almost every involvement of service personnel with the commerce in drugs, including use, possession, and distribution, is service-connected, regardless of location. However, examples of situations in which drug involvement by a servicemember which after *Relford* analysis might not be service-connected include use of marijuana by a servicemember on a lengthy leave away from the military, or off-base distribution by a servicemember of a small amount of illegal drugs to a civilian for personal use.

(5) *Offenses involving military status and the flouting of military authority.* The fact that the victim of an offense is a servicemember or that the accused used a military identification card may establish service-connection, especially in conjunction with other facts in a case. If the accused's status, either as a servicemember generally, or as the occupant of a specific position, is of central importance to the criminal activity, as where it is crucial in enabling the accused to commit the crime, service-connection will normally exist. The fact that the accused is an officer or military policeman or was in uniform when the offense was committed does not necessarily establish service-connection, although such circumstances may tend to support a finding of service-connection in conjunction with other facts.

(6) During a declared war, or a period of hostilities as a result of which Congress is unable to meet, virtually all offenses would be service-connected.

(d) *Exceptions to the service-connection requirement.*

(1) *The overseas exception.* Offenses which are committed outside the territorial limits of the United States and its possessions, and which are not subject to trial in the civilian courts of the United States, need not be service-connected to be tried by court-martial. This exception depends on the location of the commission of the offense, not on the location of the trial. Note that the overseas exception does not apply to all offenses committed abroad, for some criminal statutes of the United States apply to its citizens abroad. The offense must be service-connected in this case because the offense may also be tried in a civilian court of the United States. The fact that the offense occurred overseas may be a factor tending to establish service connection, however, even if potentially subject to trial in Federal civilian court.

(2) *The petty offenses exception.* Petty offenses may be tried by court-martial whether or not they are service-connected. An offense is petty if the maximum confinement which may be adjudged is 6 months or less and no punitive discharge is authorized.

* * *

ANALYSIS (APPENDIX 21)

Rule 203. Jurisdiction over the offense

This rule is intended to provide for the maximum possible court-martial jurisdiction over offenses. Since the constitutional limits of subject-matter jurisdiction are matters of judicial interpretation, specific rules are of limited value and may unnecessarily restrict jurisdiction more than is constitutionally required. Specific standards derived from current case law are treated in the discussion.

The discussion begins with a brief description of the rule under *O'Callahan v. Parker,* 395 U.S. 258 (1969). It also describes the requirements established in *United States v. Alef,* 3 M.J. 414 (C.M.A. 1977) to plead and prove jurisdiction. *See also* R.C.M. 907(b)(1)(A). The last three sentences in subsection (b) of the discussion are based on *United States v. Lockwood,* 15 M.J. 1 (C.M.A. 1983). The remainder of the discussion reflects the Working Group's analysis of the ap-

plication of service-connection as currently construed in judicial decisions. It is not intended as endorsement or criticism of that construction.

Subsection (c) of the discussion lists the *Relford* factors, which are starting points in service-connection analysis, although the nine additional considerations in *Relford* are also significant. These factors are not exhaustive. *United States v. Lockwood, supra. See also United States v. Trottier,* 9 M.J. 337 (C.M.A. 1980). *Relford* itself establishes the basis for (c)(2) and (c)(3) of the discussion. It has never been seriously contended that purely military offenses are not service-connected per se. *See Relford* factor number 12. Decisions uniformly have held that offenses committed on a military installation are service-connected. *See, e.g., United States v. Hedlund, supra; United States v. Daniels,* 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). *See Relford* factors 2, 3, 10, and 11. As to the third sentence in (c)(3), *see United States v. Seivers,* 8 M.J. 63 (C.M.A. 1979); *United States v. Escobar,* 7 M.J. 197 (C.M.A. 1979); *United States v. Crapo,* 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *Harkcom v. Parker,* 439 F.2d 265 (3d Cir. 1971). With respect to the fourth sentence of (c)(3), *see United States v. Hedlund, supra; United States v. Riehle,* 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969), *But cf. United States v. Lockwood, supra.* Although much of the reasoning in *United States v. McCarthy,* 2 M.J. 26 (C.M.A. 1976) has been repudiated by *United States v. Trottier, supra,* the holding of *McCarthy* still appears to support the penultimate sentence in (c)(3). *See also United States v. Lockwood, supra; United States v. Gladue,* 4 M.J. 1 (C.M.A. 1977). The last sentence is based on *United States v. Lockwood, supra.*

The discussion of drug offenses in (c)(4) is taken from *United States v. Trottier, supra.*

As to (c)(5), the first sentence is based on *United States v. Lockwood, supra.* Whether the military status of the victim or the accused's use of a military identification card can independently support service-connection is not established by the holding in *Lockwood.* The second sentence is based on *United States v. Whatley,* 5 M.J. 39 (C.M.A. 1978); *United States v. Moore,* 1 M.J. 448 (C.M.A. 1976). The last sentence

is based on *United States v. Conn, supra; United States v. Borys,* 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) (officer status of accused does not establish service-connection under Article 134) (note: service-connection of Article 133 offenses has not been judicially determined); *United States v. Saulter,* 5 M.J. 281 (C.M.A. 1978); *United States v. Conn, supra* (fact that accused was military policeman did not establish service-connection); *United States v. Armes,* 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969) (wearing uniform during commission of offense does not establish service-connection).

Subsection (c)(6) of the discussion indicates that virtually all offenses by servicemembers in time of declared war are service-connected. There is little case authority on this point. The issue was apparently not addressed during the conflict in Vietnam; of course, the overseas exception provided jurisdiction over offenses committed in the theater of hostilities. The emphasis in *O'Callahan* on the fact that the offenses occurred in peacetime (*see Relford* factor number 5) strongly suggests a different balance in time of war. Furthermore, in *Warner v. Flemings,* a companion case decided with *Gosa v. Mayden,* 413 U.S. 665 (1973), Justices Douglas and Stewart concurred in the result in upholding Flemings' court-martial conviction for stealing an automobile while off post and absent without authority in 1944, on grounds that such an offense, during a congressionally declared war, is service-connected. The other Justices did not reach this question. Assigning *Relford* factor number 5 such extensive, indeed controlling, weight during time of declared war is appropriate in view of the need for broad and clear jurisdictional lines in such a period.

Subsection (d) of the discussion lists recognized exceptions to the service-connection requirement. The overseas exception was first recognized in *United States v. Weinstein,* 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969). *See also United States v. Keaton,* 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). The overseas exception flows from *O'Callahan's* basic premise: that the service-connection requirement is necessary to protect the constitutional right of service members to indictment by grand jury and trial by jury. While this premise might not be evident from a reading of *O'Callahan* alone, the Supreme Court subsequently confirmed that this was the basis of the

O'Callahan rule. *See Gosa v. Mayden, supra* at 677. Since normally no civilian court in which the accused would have those rights is available in the foreign setting, the service-connection limitation does not apply.

The situs of the offense, not the trial, determines whether the exception may apply. *United States v. Newvine,* 23 U.S.C.M.A. 208, 48 C.M.R. 960 (1974); *United States v. Bowers,* 47 C.M.R. 516 (A.C.M.R. 1973). The last sentence in the discussion of the overseas exception is based on *United States v. Black,* 1 M.J. 340 (C.M.A. 1976). *See also United States v. Gladue,* 4 M.J. 1 (C.M.A. 1977); *United States v. Lazzaro,* 2 M.J. 76 (C.M.A. 1976). Some Federal courts have suggested that the existence of court-martial jurisdiction over an overseas offense does not depend solely on the fact that the offense is not cognizable in the United States civilian courts. *See Hemphill v. Moseley,* 443 F. 2d 322 (10th Cir. 1971). *See also United States v. King,* 6 M.J. 553 (A.C.M.R. 1978), *pet. denied,* 6 M.J. 290 (1979).

Several Federal courts which have addressed this issue have also held that the foreign situs of a trial is sufficient to support court-martial jurisdiction, although the rationale for this result has not been uniform. *See, e.g., Williams v. Froehlke,* 490 F.2d 998 (2d Cir. 1974); *Wimberly v. Laird,* 472 F.2d 923 (7th Cir.), *cert. denied,* 413 U.S. 921 (1973); *Gallagher v. United States,* 423 F.2d 1371 (Ct. Cl.), *cert. denied,* 400 U.S. 849 (1970); *Bell v. Clark,* 308 F.Supp. 384 (E.D. Va. 1970), *aff'd,* 437 F.2d 200 (4th Cir. 1971). As several of these decisions recognize, the foreign situs of an offense is a factor weighting heavily in favor of service-connection even without an exception for overseas offenses. *See Relford* factors 4 and 8. The logistical difficulties, the disruptive effect on military activities, the delays in disposing of offense, and the need for an armed force in a foreign country to control its own members all militate toward service-connection for offense committed abroad. Another consideration, often cited by the courts, is the likelihood that if the service-connection rule were applied overseas as it is in the United States, the practical effect would be far more fre-

quent exercise of jurisdiction by host nations, thus depriving the individual of constitutional protections the rule is designed to protect.

The petty offenses exception rests on a similar doctrinal foundation as the overseas exception. Because there in no constitutional right to indictment by grand jury or trial by jury for petty offenses (*see Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Duke v. United States*, 301 U.S. 492 (1937)), the service-connection requirement does not apply to them. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969). Under *Baldwin v. New York, supra*, a petty offense in one in which the maximum sentence is six months confinement or less. Any time a punitive discharge is included in the maximum punishment, the offense in not petty. *See United States v. Smith*, 9 M.J. 359, 360 n. 1 (C.M.A. 1980); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962).

Sharkey relied on the maximum punishment under the table of maximum punishments in determining whether an offense is petty. It is the view of the Working Group that offenses tried by summary courts-martial and special court-martial at which no punitive discharge may be adjudged are "petty offenses" for purposes of *O'Callahan* in view of the jurisdictional limitations of such courts. Whether the jurisdictional limits of a summary or such special court-martial makes an offense referred to such a court-martial petty has not been judicially determined.

U.S. GOVERNMENT PRINTING OFFICE: 1986—169-201/42007

No. 86-934

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT T. PUSKARIC AND CHESTER JENKINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., USAF

ROBERT E. GIOVAGNONI
Lt. Col., USAF

MARC VAN NUYS
Capt., USAF

Appellate Government Counsel
Government Trial and Appellate
Counsel Division
HQ USAF/JAJG
Bolling AFB, D.C. 20332-6128

10 pp

QUESTION PRESENTED

Whether the offenses committed by petitioners—sexual assaults on the dependent children of fellow servicemen—are sufficiently "service connected" to authorize a prosecution in the military system.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-934

ROBERT T. PUSKARIC AND CHESTER JENKINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The orders of the Court of Military Appeals (Pet. App. 1a, 2a) are reported at 23 M.J. 178. The opinions of the Air Force Court of Military Review (Pet. App. 3a-4a, 5a-6a) are unreported.

JURISDICTION

The judgments of the Court of Military Appeals (Pet. App. 1a, 2a) were entered on October 9, 1986. The petition for a writ of certiorari was filed on December 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

1. Following a general court-martial before a military judge at Loring Air Force Base in Maine, petitioner Puskaric, a member of the United States Air Force, was convicted of two specifications of committing indecent acts against a minor, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to 24 months' confinement, a bad conduct discharge, forfeiture of $100 pay per month for 24 months, and a reduction in rank to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 3a-4a). The Court of Military Appeals affirmed (*id.* at 1a).

a. Petitioner Puskaric, his wife, and the father of the victim were all active duty members of the Air Force at the time of the crimes (Tr. 14). All three were stationed at Loring Air Force Base and were assigned to the same squadron. Puskaric's wife and the victim's father worked in the same office, and Puskaric worked in the same building (*id.* at 13-14, 32-33).

Puskaric first met the victim, Melanie Verberg, at her home on Loring Air Force Base, when Melanie and her mother were babysitting for Puskaric's infant son (Tr. 15, 25). Melanie, who was 10 years of age at the time of the assaults (*id.* at 59), became a friend of Puskaric's and occasionally visited his on-base residence. In April 1983 Melanie stayed overnight at the Puskarics' on-base residence to help the Puskarics paint (*id.* at 26). While Melanie was there, Puskaric twice sexually molested her (*id.* at 60-61, 62-63, 77-79, 85).

By the summer of 1983, Puskaric and his wife had separated and he had moved into an off-base apartment in Caribou, Maine, which is about six miles from Loring. Puskaric obtained permission from Melanie's mother to have Melanie come to his apartment for a weekend to help with his son (Tr. 16-22). During the weekend, Puskaric again sexually molested Melanie (*id.* at 68, 73-74, 80-81, 84-85).

In September 1983, Melanie and her parents left Loring and moved to Michigan. Melanie's father was no longer in the Air Force at the time of trial (Tr. 13). On January 17, 1985, the District Attorney for Aroostock County, Maine, advised the Loring AFB authorities that he would defer prosecution of Puskaric to the military.[1]

b. Specification one of the charge alleged that Puskaric molested Melanie Verberg on Loring Air Force Base. Specification two alleged that Puskaric molested Melanie at Caribou, Maine. Before arraignment, Puskaric moved to dismiss specification two on the ground that the offense was not "service connected" under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), and therefore could not be prosecuted in a military court (Tr. 11; AX 5). Following a hearing, the trial judge denied the motion and entered find-

---

[1] The District Attorney's letter read, in part, as follows (AX 6 (attachment)):

> It is further my understanding that the most serious contact with the victim * * * took place on Loring and that the off base conduct was incidental to a relationship overwhelmingly connected to the military community, and that the Air Force has initiated, or intends to initiate, prosecution against Robert T. Puskaric to the fullest exten[t] of military law. Accordingly, I hereby decline civil prosecution and defer the entire matter to your authority.

ings (Tr. 41-42).[2] Puskaric thereafter pleaded guilty to specification one and not guilty to specification two (*id.* at 43-49). Following a bench trial, Puskaric was found guilty on specification two (*id.* at 106).

c. The Air Force Court of Military Review summarily affirmed the findings and sentence without discussing the service-connection issue (Pet. App. 3a-4a). Relying on *United States* v. *Solorio*, 21 M.J. 251 (C.M.A. 1986), cert. granted, No. 85-1581 (June 16, 1986), the Court of Military Appeals summarily affirmed petitioner Puskaric's conviction for the off-base specification (Pet. App. 1a).

2. Following a general court-martial at Edwards Air Force Base, California, petitioner Jenkins, a member of the United States Air Force, was convicted of carnal knowledge of a minor, sodomy with a minor, wrongful solicitation to commit sodomy, and contributing to the delinquency of a minor, in violation of Articles 120, 125 and 134, UCMJ, 10 U.S.C. 920, 925, and 934. He was sentenced to nine years' confinement, a dishonorable discharge, total forfeiture of pay, and a reduction in rank to the lowest enlisted grade. The convening authority reduced the term of confinement to five years but other-

---

[2] The trial judge's findings are reprinted in the petition (at 5-6). He found that the off-base offenses constituted a threat to Loring Air Force Base because the victim was a dependent of a servicemember stationed at the base (Finding No. 12). He also found that the off-base offenses were facilitated by the on-base military relationship among petitioner, his servicemember wife, and the victim's family (Finding No. 15), and that the joint trial of the offenses would promote "[e]conomy of judicial effort" (Finding No. 17).

wise approved the findings and sentence.[3] The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 5a-6a). The Court of Military Appeals affirmed (*id.* at 2a).

a. Jenkins first met the victim, Lisa Acosta, at the Edwards Air Force Base commissary in late June or early July 1983 while she was shopping with her parents (Tr. 56). Lisa, who was 14 years old, was the dependent daughter of an active duty Air Force staff sergeant stationed and residing at the base (*id.* at 55-57). Between July 15 and 18, 1983, Lisa met Jenkins on base and spoke with him on the telephone on several occasions (*id.* at 57-60). On July 18, Jenkins met Lisa at the Edwards Air Force base bowling alley. After leaving the bowling alley and driving around the base in Jenkins' car, Jenkins and Lisa eventually went to a park about 20 miles from the base with a friend of Lisa's and a friend of Jenkins' (*id.* at 60-62, 144). While he was alone in his car with Lisa, Jenkins asked Lisa to perform fellatio (*id.* at 62). When Lisa refused, Jenkins became quite upset and threatened to hit her (*id.* at 62-63). Jenkins, Lisa, and their friends then drove back to the base (*id.* at 63).[4]

A week later, Jenkins telephoned Lisa at home and asked her out (Tr. 63-64). To conceal the date from Lisa's parents, Jenkins told Lisa to explain to her

---

[3] Article 60(c)(2), UCMJ, 10 U.S.C. (& Supp. III) 860(c)(2), empowers the convening authority to approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase the punishment, however. Rule 1107(d)(1), *Manual for Courts-Martial, United States—1984.*

[4] Jenkins' conduct on that evening served as the basis for the specification charging him with solicitation.

mother that she would be babysitting (*id.* at 64). That evening, Jenkins drove Lisa to a park on the base. Jenkins again asked Lisa to perform fellatio (*id.* at 66). Lisa complied, fearing that Jenkins would become angry if she refused (*ibid.*). From the park they drove to another location on the base where Jenkins had Lisa perform fellatio again, and where they engaged in sexual intercourse (*id.* at 68-70).

On September 12, 1984, a Deputy District Attorney for Los Angeles County advised the Edwards Air Force Base authorities that his office would not prosecute Jenkins for the off-base solicitation offense, for two reasons: Jenkins allegedly committed more serious offenses against the same victim on the base, and the two witnesses to the off-base offense were at that time residing in Germany and Arizona, respectively (AX 1).

b. Before arraignment, Jenkins moved to dismiss the solicitation charge on the ground that it occurred off-base and was therefore not "service connect[ed]" (Tr. 144). The trial judge rejected the motion (*id.* at 145). He found that the relationship between Jenkins and his victim was the direct result of their common residence on Edwards Air Force Base; that a majority of the charged crimes occurred on-base; and that principles of judicial economy favored disposing of all the charges in the same forum (*ibid.*).

c. The Air Force Court of Military Review affirmed Jenkins' convictions without discussing the service-connection issue (Pet. App. 5a-6a). Relying on its decision in *United States* v. *Solorio*, *supra*, the Court of Military Appeals summarily affirmed Jenkins' conviction for the off-base solicitation offense (Pet. App. 2a).

DISCUSSION

Petitioners contend that the military courts were not authorized to try them for their off-base crimes because the offenses were not "service connected" under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). The question presented in these cases is not materially different from one of the questions in *Solorio* v. *United States*, cert. granted, No. 85-1581 (June 16, 1986).[5] All three cases involve offenses committed against the minor dependents of fellow servicemembers, all three cases involve on-base and off-base crimes, and all three cases involve a decision by civilian authorities to defer prosecution of the off-base crimes to the military. The petition in this case should therefore be disposed of in light of the Court's decision in *Solorio*.

---

[5] The petitioner in *Solorio* also argues that trying him before a court-martial violated the Due Process Clause by denying him fair warning that he was subject to prosecution in the military courts. These cases do not present that question.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's resolution of Question One in *Solorio* v. *United States*, cert. granted, No. 85-1581 (June 16, 1986).

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOE R. LAMPORT
Col., USAF

ROBERT E. GIOVAGNONI
Lt. Col., USAF

MARC VAN NUYS
Capt., USAF

Appellate Government Counsel
Government Trial and Appellate
Counsel Division

FEBRUARY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40204